

## ALERTS AND UPDATES

### The Changing Landscape of Competition Law: Massachusetts Noncompete Bill Re-Filed

January 27, 2011

Over the past two years, various versions of legislation were introduced before the Massachusetts Legislature to reform the existing law on employee noncompetition agreements in the state. A compromise bill has recently been re-filed.

In 2009, a bill was proposed that would have created a total ban on all employee noncompetition agreements under Massachusetts law, prospectively from the date the legislation was enacted. That bill did not receive sufficient support, and a series of compromise bills were proposed afterwards. A compromise bill received substantial public support and positive media coverage during the 2009–2010 legislative session, but nevertheless, it did not reach the floor for a vote by the end of the session. Notwithstanding the support that bill received during the last legislative session, there was strong opposition to certain key provisions contained, which ultimately resulted in its not being considered for a final vote. The sponsors of the compromise bill re-filed a bill on January 20, 2011.

The new bill essentially codifies some of the existing law on employee noncompetition agreements in Massachusetts and seeks to add some additional bright-line rules. Consistent with existing law in Massachusetts, under the bill, the noncompetition agreement would have to protect a legitimate business interest. Legitimate business interests include:

1. trade secrets as defined under Massachusetts law,
2. employer confidential information and
3. employer goodwill.

Under the bill, also consistent with existing Massachusetts law, the duration and geographical scope of the noncompetition agreement—and the scope of activities proscribed—would all have to be reasonable. The proposed law would establish a one-year maximum on the duration of the noncompetition clause, with an exception for paid "garden leave" covenants which may be up to two years.

What may be considered a controversial part of the bill relates to a section that would allow for the recovery of reasonable attorneys' fees in actions to enforce or to defend against enforcement of noncompetition agreements. The proposed law also rejects the "inevitable disclosure doctrine" often used in litigation as a basis to enjoin a former employee from working in a job that would inevitably result in the use of trade secrets; although employees are still not free to make use of or to disclose trade secrets or confidential information belonging to a former employer.

#### What This Means for Employers

The proposed law, if enacted, would apply to employee noncompetition agreements entered into on or after January 1, 2012. Considering the support the bill received in the last session, the sponsors anticipate that with certain changes, the new bill should be able to gain enough support for a final vote and passage in the upcoming session. Therefore, employers may want to ensure that any restrictive covenants are drafted to meet all requirements for enforcement under Massachusetts law. It may also be prudent to enter into restrictive covenants prior to year-end if the term is anticipated to exceed one year.

## **For Further Information**

If you have any questions about this *Alert* or would like more information, please contact any [member](#) of the [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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